Multi-Amp Testing Services Corporation *and* Ronald J. Martindale and James R. Bradshaw. Cases 7-CA-17505 and 7-CA-17505(2)

August 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 27, 1981, Administrative Law Judge Irwin H. Socoloff issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief in answer to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

[1] Pursuant to the General Counsel's post-hearing motion, the Administrative Law Judge corrected the record to reflect Martindale's direct testimony to the effect that when Hahn discharged him he said to Martindale: "You *two* thought you would coerce me into giving you a raise, by going through the customer." (Emphasis supplied.) The Respondent excepts to the granting of this motion, asserting that there is no valid basis for changing the printed record which reads: "You thought you would . . . ." To the contrary, the record reveals the following exchange during cross-examination of Martindale by the Respondent's counsel:

> Q. What did he tell you?
>
> A. He told me that—as I remember it, he said, "You two thought you would coerce me into giving you a raise."
>
> Q. What was "you two?"
>
> A. Referring to Jim Bradshaw and myself.

There is no indication of surprise at this point on counsel's part nor any suggestion that the statement ascribed to Hahn during Martindale's cross-examination differed in substance from that set out in direct. Accordingly, we find no merit in the Respondent's exception.

Notwithstanding, the record before us does not prove the General Counsel's contention that Hahn's reference to "you two" somehow exposes his thinking and, therefore, the Respondent's belief, albeit erroneous, that Martindale and Bradshaw engaged in concerted activity and that they were discharged for that reason. The evidence as a whole shows that the Respondent decided to discharge Martindale, and did so, because it believed he had passed company documents to a third party; and that the decision to discharge Bradshaw was made only after the Respondent gained the impression in the process of discharging Martindale that Bradshaw had also engaged in separate, similar conduct. In this context, Hahn's passing remark does no more than articulate his strong disapproval of the separate courses of action he believed each of the employees had undertaken in furtherance of their respective pay raise objectives.

[2] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon charges filed on March 11, 1980, by Ronald J. Martindale, an individual, and on April 4, 1980, by James R. Bradshaw, an individual, against Multi-Amp Testing Services Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint dated April 16, 1980, alleging violations by Respondent of Section 8(a)(1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondent, by its answer, denies the commission of any unfair labor practices.

Pursuant to notice, a hearing was held before me in Detroit, Michigan, on October 8 and 9, 1980, at which the General Counsel and Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case,[1] and from my observations of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation, maintains its principal office and place of business in Dallas, Texas. It is engaged, at various installations within the United States, including Detroit Edison Company's Fermi II plant in Monroe, Michigan, in the startup testing of nuclear power plants. During the year ending December 31, 1979, a representative period, Respondent, in the course and conduct of its business operations, performed services valued in excess of $50,000 for the Detroit Edison Company, at the Fermi II plant, in Monroe, Michigan. In that same time period, Detroit Edison Company received, at its Fermi II plant, supplies valued in excess of $50,000 which were sent directly from points located outside the State of Michigan. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Respondent's motion to correct the official record is granted. The General Counsel's motion to correct the record is granted except for the correction requested at p. 132, ll. 12-13.

II. THE UNFAIR LABOR PRACTICES[2]

A. *Background*

On March 4, 1980, Respondent discharged its electrical test technicians, Ronald J. Martindale and James R. Bradshaw. The General Counsel contends, in substance, that the discharges resulted from Respondent's belief that those employees had, in tandem, sought the aid and support of Respondent's customer in their wage dispute with their Employer, a protected concerted activity. Thus, the General Counsel urges that the discharges were violative of Section 8(a)(1) of the Act. Respondent contends that the activities engaged in by Martindale and Bradshaw were neither concerted nor protected and that Respondent, at the time of discharge, fully believed that the employees had engaged in individual actions in contravention of lawful work rules. Also at issue is whether Respondent violated the Act when, some months prior to the discharges, it informed employees that they were not to discuss "internal affairs" with Respondent's customers and, when, on March 4, 1980, it enforced said rule by discharging Martindale and Bradshaw.

B. *Facts*

Martindale and Bradshaw were hired in January 1979. Until their discharges, they worked at Detroit Edison Company's Fermi II location, a nuclear power plant construction site, where Respondent, MATSCO, pursuant to contract with Detroit Edison, was engaged in the performance of certain technical functions. At this site, MATSCO employees shared common offices and facilities with the employees of Detroit Edison and those of Stone and Webster Engineering Company. Contrary to Respondent's usual practices, it did not, until November 1979 have an onsite supervisor at the Fermi II plant. Rather, its test technicians were supervised by MATSCO General Manager L. Curtis Hahn whose office is located in Dallas, Texas. On a day-to-day basis, MATSCO employees received work assignments and directions from supervisors of Detroit Edison and Stone and Webster.

In October 1979, Respondent conducted its annual companywide employee safety meeting. During the course of that gathering, General Manager Hahn was approached by some 80 percent of the MATSCO employees who asked about anticipated wage increases. Such inquiries were made, separately, by Martindale and Bradshaw, both of whom were told that the matter would be addressed at a later date. One month later, Hahn visited the Fermi II plant for the purpose, *inter alia*, of informing employees about their wage increases. When Hahn met with Martindale, the employee stated that the announced raise was inadequate. Hahn responded, stating that, in the absence of evaluations by an onsite supervisor, he, Hahn, was not certain that the raise was a "just" one. However, Martindale was assured that, in 90 days, after the then newly appointed onsite supervisor[3] had prepared and submitted three monthly evaluations of the employee, his rate of pay would be further reviewed. Hahn had a similar conversation with Bradshaw.

Hahn again visited the Fermi II site, in December 1979, and conducted a meeting, at a local motel of the MATSCO employees working at that location. The meeting was also attended by MATSCO President Redlhammer. Respondent's officials informed the gathered employees, including Martindale and Bradshaw, that irreparable damage to Respondent had resulted from employee communications to customers and competitors concerning the internal workings of MATSCO. The employees were instructed, under penalty of discharge, that they were not to have discussions about Respondent's "internal affairs" with representatives of the Detroit Edison Company or other customers. The record evidence does not reveal how, if at all, "internal affairs" was defined at the meeting. However, it is undisputed that neither Hahn nor Redlhammer used the terms "wages" or "working conditions" in announcing the rule.

In late January 1980, Rodney Nichols was appointed as the new supervisor at the Fermi II site. Shortly thereafter, Nichols completed a monthly evaluation of both Martindale and Bradshaw, the third such evaluation for each employee following the November 1979 wage increase. Nichols forwarded the ratings to the Dallas office, along with a one-page memorandum recommending additional wage increases for the two employees. In mid-February, the Nichols memorandum was returned to him and it contained an additional paragraph, at the bottom of the page, written by Hahn, denying the requested increases. Nichols called Martindale and Bradshaw to the supervisor's desk, showed them the memorandum and response, and discussed the matter with the employees, both of whom expressed their dissatisfactions. This conversation occurred within "earshot" of Detroit Edison and/or Stone and Webster employees and, at its conclusion, Nichols granted Bradshaw's request to borrow the memorandum in order to make a copy for his own files. As Martindale also expressed a desire to have a copy, Bradshaw made two copies and, then, returned the original to Nichols.

Later that same day, Martindale was approached by John Icard, an employee of Stone and Webster, who supervised, on a day-to-day basis, the work of Martindale and Bradshaw. Icard asked Martindale why he looked depressed and the employee stated, "I didn't get my raise." Martindale showed the Nichols memorandum and the Hahn response to Icard who asked the employee if he intended to seek other employment. Martindale stated, yes. Icard then had a similar conversation with Bradshaw. Immediately thereafter, Icard prepared, at his own instance, and without the knowledge of either Martindale or Bradshaw, a memorandum to Detroit Edison supervisors expressing fears that Martindale and Bradshaw would leave their jobs because they had been denied pay

[2] The fact findings contained herein are based on a composite of the documentary and testimonial evidence introduced at the hearing. The record is generally free of significant evidentiary conflict.

[3] At or about that time, Respondent appointed one Woodard Kinnebrew as its supervisor. However, Kinnebrew exercised administrative responsibilities only, while MATSCO employees continued to receive work directions from the supervisors of other companies. Also, at that time, Respondent named Bradshaw, who had previously served as "liaison" between MATSCO and Detroit Edison, as assistant supervisor. In January 1980, Bradshaw was relieved of his responsibilities as assistant supervisor.

increases. Attached to the Icard memorandum was the Nichols memorandum and the Hahn response. Icard gave copies of those documents to Nichols. After sending his memorandum to Detroit Edison officials, Icard showed a copy of same to Martindale who stated that he, Martindale, would take care of his own business. On the next day, a representative of Detroit Edison Company furnished a copy of the Icard memorandum, with attachments, to Hahn.

On Friday, March 1, 1980, Hahn met with Nichols[4] and Respondent's manager of operations and sales, John Lapacola, to investigate the matter. Hahn asked Nichols how his memorandum to Nichols, a confidential document, had wound up in the hands of Detroit Edison and Stone and Webster officials. Nichols falsely stated that he had not given the memorandum to anyone and that Martindale must have taken it from his (Nichols') desk and copied it. Nichols further stated that Martindale had distributed such copies. At that point, according to Hahn's testimony, he decided to discharge Martindale for violating Respondent's rule against "taking the internal workings of our company to others."

Hahn, Lapacola, and Nichols met with Martindale on Monday, March 4, in a conference room at the Fermi II site. Hahn asked Martindale if he remembered the December meeting at which the "internal affairs" rule was discussed. Martindale said, yes. Hahn stated that he had evidence that Martindale had broken the rule by soliciting Icard to intervene on the pay matter. Martindale denied doing so and stated that it was Bradshaw, with Nichols' permission, who had copied the Nichols memorandum and the Hahn response. Martindale stated that Icard had taken the copy, given to Martindale by Bradshaw, which he, Martindale, had placed on his desk. Hahn told Martindale, "You two thought you would coerce me into giving you a raise, by going through the customer." Hahn then left the room to make investigatory telephone calls. He returned some 5 to 15 minutes later. According to Martindale's testimony, it was at that point in time that he was told by Hahn that he, Martindale, was discharged. According to the testimony of Hahn and Lapacola, Hahn so informed Martindale near the beginning of the meeting and before Martindale had implicated Bradshaw. In any event, after Martindale had left the room, following his termination, Hahn told Lapacola that the information gleaned from Martindale, concerning Bradshaw, had been confirmed. At that point, Bradshaw was summoned to appear in the conference room. Hahn reminded the employee of the "internal affairs" rule and stated that he had proof that "you went to the customer about your pay raise. On that basis, I am going to discharge you from the company." Bradshaw stated that he had done no such thing but Hahn insisted that he had proof to the contrary. Hahn told Bradshaw, "I am discharging you and Ron Martindale both, you know, for going to the customer, with the documents."

[4] The complaint alleges, and the answer admits, that Hahn and Nichols, as well as Redlhammer and Kinnebrew, were, at all times material herein, supervisors within the meaning of the Act.

C. *Conclusions*

As the General Counsel concedes, and as the Charging Parties themselves testified, Martindale and Bradshaw did not act in concert. Each pursued an individual wage increase in an individual manner. Neither employee solicited the aid of a third party. Nonetheless, the General Counsel contends that the discharges were unlawful because they were based on Respondent's erroneous belief that Martindale and Bradshaw had sought, concertedly, the aid and support of Icard in furtherance of their efforts to obtain wage increases.

Under Section 7 of the Act, employees have a protected right to discuss wage rates as part and parcel of their concerted activities.[5] They may also engage in such discussions with third parties "in an effort to obtain the third party's assistance in circumstances where the communication [is] related to a legitimate, ongoing labor dispute between the employees and their employer, and where the communication [does] not constitute a disparagement or vilification of the employer's product or its reputation."[6] Thus, if, as claimed by the General Counsel, Respondent discharged the Charging Parties because it believed that they had, in concert, sought to utilize Icard as a pressure tactic in order to secure wage increases for themselves, the discharges were unlawful.[7] While Respondent contends that, in any event, when Martindale and Bradshaw, acting separately, brought the dispute, and Respondent's internal memorandums concerning same, to Icard, they engaged in activities tending to undermine Respondent's business, there is an absence of record evidence demonstrating that this is so. Accordingly, otherwise protected activity would not have lost its protected status for that reason.

This case is a close one. There are factors present which might well have led Respondent to believe that the Charging Parties had, in concert, sought the aid of Icard in their efforts to obtain wage increases. In that connection, I note that the Icard memorandum treated the two employees as a unit. It is also true that Martindale and Bradshaw were discharged, on the same day, for having engaged in the same supposed misconduct. On the other hand, Respondent treated the two discharges as separate matters. Thus, Hahn credibly testified that, on March 4, when he arrived at the Fermi II site, he had evidence that Martindale, alone, had passed documents to Icard and, so, at that point in time, he, Hahn, had decided to terminate the one employee. Respondent first received information indicating that Bradshaw had also engaged in that conduct during the course of the Martindale termination interview, when it was so advised by Martindale.[8] After brief investigation, Respondent then determined that it would also discharge Bradshaw. Hahn testified that, at no point in time, were there facts

[5] *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217 (1976).

[6] *Allied Aviation Service Company of New Jersey, Inc.*, 248 NLRB 229 (1980).

[7] *Henning and Cheadle, Inc.*, 212 NLRB 776 (1974).

[8] It is significant that, in the course of the discharge interview, Bradshaw's name was introduced into the conversation by Martindale. There is no evidence showing that, prior to that time, Respondent planned to take disciplinary action against Bradshaw.

before him tending to show that the two employees had acted together in seeking wage increases. While, as noted, the circumstances are not free from suspicion, the burden of proof is on the General Counsel to show, by a preponderance of evidence, that Hahn discharged the employees due to a mistaken belief that they had acted in concert. That burden has not been met.

With respect to the rule promulgated in December 1979 against disclosure of "internal affairs" to customers and competitors, that rule, on its face, is not unlawful. Nor is there evidence that the rule was unlawfully promulgated. As applied to the Charging Parties herein, illegality has not been demonstrated because, concededly, those employees were not engaged in concerted activities.

In light of the foregoing, I conclude that the institution of the "internal affairs" rule was not in violation of the Act. Likewise, Respondent did not violate the Act when it discharged Martindale and Bradshaw.

CONCLUSIONS OF LAW

1. Respondent, Multi-Amp Testing Services Corporation, is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent did not engage in unfair labor practice conduct as alleged in the complaint.

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The complaint is dismissed in its entirety.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."